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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

VS.

WILLIAM DUNCAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether the decision issued below by the Illinois Supreme Court directly contradicts this Court's recent decision in *Richardson v. Marsh*, ____ U.S. ____ (1987) (No. 85-1433, announced April 21, 1987).

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI:	
THE DECISION RENDERED BELOW BY THE ILLINOIS SUPREME COURT DIRECTLY CONTRADICTS THE DECISION BY THIS COURT IN *RICHARDSON v. MARSH* ON AN ISSUE OF FEDERAL CONSTITUTIONAL LAW AND SHOULD BE SUMMARILY REVERSED	6
CONCLUSION	9

APPENDICES

A— Opinion of the Supreme Court of Illinois, dated January 30, 1987	App. 1
B— Order of the Supreme Court of Illinois denying the Petition for Rehearing, issued March 30, 1987	App. 14

TABLE OF AUTHORITIES

CASES:	PAGE(S):
Bruton v. United States, 391 U.S. 123 (1968) ..	5, 6
People v. Duncan, 115 Ill. 2d 429 (1987)	1, 7
People v. Olinger, 112 Ill. 2d 324, 439 N.E.2d 579 (1986)	5
Richardson v. Marsh, ____ U.S. ____, 41 Cr. L. Rptr. 3039 (No. 85-1433, announced 4/21/87) ..	5, 7

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported as *People v. Duncan*, 115 Ill. 2d 429, 505 N.E.2d 307 (1987). The text of that decision is attached to this petition as Appendix A. The Order of the Illinois Supreme Court issued March 30, 1987, denying petitioners' Petition For Rehearing, is not reported. The text of that Order is appended to this petition as Appendix B.

JURISDICTION

On January 30, 1987, the Illinois Supreme Court reversed respondent's convictions for murder, armed robbery, armed violence and conspiracy on the basis of perceived violations of respondent's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Thereafter, on March 30, 1987, the Illinois Supreme Court denied a Petition For Rehearing of that decision. On May 1, 1987, the Illinois Supreme Court recalled and stayed its mandate in this cause, so as to permit the filing of the instant petition.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Pursuant to this Court's Rules 20.1 and 20.4, this petition has been lodged within sixty (60) days of the Illinois Supreme Court's denial of the Petition For Rehearing, which was issued March 30, 1987.

STATEMENT OF THE CASE

The following facts are relevant to the issues posed by the instant petition for *certiorari*.

Respondent, William Duncan, was indicted by a Whiteside County, Illinois, Grand Jury on several counts of murder, armed robbery, armed violence and conspiracy. (C. 2-7) Also indicted was codefendant Perry Olinger; Duncan and Olinger were tried jointly, over their objections.

The defendants were charged with the murders of James Adams, Gordon "Kayo" Stevens, and Debbie Bush-

man which occurred in Whiteside County, Illinois, on May 25, 1982. The prosecution's theory of its case may be summarized as follows: respondent Duncan and the deceased James Adams had recently been involved in several drug transactions whereby the two made trips to Kansas City, Missouri, where they purchased substantial quantities of cocaine and marijuana, and returned to Whiteside County to sell these drugs for a profit. These activities became known to Perry Olinger, who determined that he would rob respondent and Adams, take their drugs, murder them to avoid apprehension, and sell the contraband himself.

The prosecution introduced evidence tending to show that Olinger desired a partner in this enterprise. Approximately one week prior to the murders in question, Olinger twice solicited one Edward Stalder to assist him. Stalder testified at the joint trial that Olinger expressed his intent to "eliminate [one] Jim Adams and a Bill . . . [to] rip them off . . . and to make sure there wasn't (sic) any witnesses left. . . .". (R. III, 284-85) Stalder testified that he declined Olinger's offer.

Other evidence adduced by the prosecution tended to show that Olinger next solicited the deceased "Kayo" Stevens to be his partner in selling the drugs he intended to steal from Adams and respondent. (*See, e.g.*, R. II, 463-466)

On the evening before the murders Olinger appeared at the residence owned by Adams, where respondent had recently been staying. Adams, however, soon departed after indicating that he was about to consummate "a big deal" to sell the remaining cocaine, which at this point had a street value of $10,000. (R. V, 126-129, 132) This left Olinger, Olinger's girlfriend, and respondent alone in Adams' house, where Olinger and respondent spent sev-

eral hours conversing at a kitchen table as Olinger's girlfriend watched television in another room.

Sometime around 7:30 a.m. the next day Adams returned home. He was thereupon beaten, stabbed in the throat, and his skull crushed by repeated blows from a blunt object. (R. III, 107-116) Over $1,000 in cash was stolen from his person (R. II, 219) but Adams had apparently hidden his cache of cocaine in his garage before encountering his assailants, and it was found there several days later. (R. III, 43-44)

Adams' badly beaten body was found at 9:30 a.m. in the kitchen of his home. Only nine (9) feet away from the body, lying on a couch, was respondent. When Adams' girlfriend discovered Adams' body and respondent, respondent asserted he had been asleep and thus did not know who killed Adams. He asserted the same claim at trial.

The prosecution urged to the jury, based on substantial evidence not fully detailed here, that Olinger went to Adams' house with the intent to kill both Adams and respondent, as he had said he would do when soliciting Stalder. The prosecution urged further that Olinger subsequently determined respondent would be of more value as a live partner than a dead victim, inasmuch as only respondent was able to secure large quantities of drugs from Kansas City. (R. V, 100) The prosecution asserted that Olinger persuaded respondent to assist him in stealing Adams' cocaine; that Adams was tortured and beaten in an effort to force him to reveal where he had hidden the drugs; that after Adams died Olinger and respondent concluded it would arouse suspicion for Duncan to attempt to flee the residence and thus he ingested a tranquilizer and slept in Adams' residence; and that Olinger then determined it necessary to kill "Kayo" Stevens because Stevens could implicate Olinger in a plot to murder Adams.

With regard to this latter inference, the prosecution adduced proof that Stevens was shot with a pistol possessed by Olinger, that Stevens apparently knew his assailant, and that Ms. Bushman's murder was attributable to her presence as a witness to the Stevens murder.

Respondent and Olinger were found guilty by the jury on all counts of their indictment. Olinger was sentenced to death, a conviction and sentence which were affirmed on direct appeal. *People v. Olinger*, 112 Ill. 2d 324, 493 N.E.2d 579 (1986). Respondent was sentenced to a term of imprisonment for life, and his convictions were affirmed in an initial appeal to the Illinois Appellate Court. *People v. Duncan*, 133 Ill. App. 3d 489 (3d Dist. 1986).

Respondent sought and received a discretionary appeal to the Illinois Supreme Court. In that appeal he urged that admission of certain testimony from witness Edward Stalder violated his rights under the rule in *Bruton v. United States*, 391 U.S. 123 (1968). Respondent submitted that constitutional error arose when Stalder stated that Olinger had expressed an intent to "eliminate . . . Jim Adams and a Bill" and to assure that no witnesses would be allowed to survive. (Olinger did not testify at trial. Prior to the receipt of Stalder's testimony the trial court instructed the jury to consider the testimony only as evidence against Olinger, but not as to respondent.)

On January 30, 1987, the Illinois Supreme Court reversed respondent's convictions and ordered that he be granted a new trial, relying on the *Bruton* claim. The petitioners promptly filed a Petition For Rehearing, asserting that no *Bruton* error arises unless the challenged statement directly implicates a defendant. On March 30, 1987, that petition was denied. On April 21, 1987, this Court issued its decision in *Richardson v. Marsh*, ____ U.S. ____ (No. 85-1433, announced 4/21/87).

REASONS FOR GRANTING CERTIORARI

THE DECISION RENDERED BELOW BY THE ILLINOIS SUPREME COURT DIRECTLY CONTRADICTS THE DECISION BY THIS COURT IN *RICHARDSON v. MARSH* ON AN ISSUE OF FEDERAL CONSTITUTIONAL LAW AND SHOULD BE SUMMARILY REVERSED.

Respondent and one Perry Olinger were jointly indicted and tried for a triple homicide, armed robbery, and conspiracy. A major portion of the prosecution's case against Olinger consisted of the testimony of Edward Stalder. Stalder testified that about one week before the murders in question, he was with Olinger. Olinger solicited Stalder in a plot to "eliminate" two local drug dealers, naming his intended victims as "Jim Adams and a Bill. . .". Stalder stated that Olinger assured him they could "rip them off . . . and . . . make sure there wasn't (sic) any witnesses left." Prior to the introduction of Stalder's testimony the jury was directly admonished to utilize Stalder's testimony as evidence against Olinger only, and not as to respondent.

The Supreme Court of Iliinois nonetheless reversed respondent's convictions, in a decision expressly based on this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968). The Illinois court did not dispute petitioner's insistence that the Stalder testimony did not directly implicate respondent in any crime, and that by itself the testimony actually serves to exculpate respondent as Olinger's co-conspirator. Rather, that court held that, as a matter of constitutional law, *Bruton* error arises where "incriminating implications" may be found in a challenged statement; further, the court below ruled that "(i)n evaluating incriminating implications, it is proper to consider the statement in light of the State's *other evidence* against

the defendant." *People v. Duncan*, 115 Ill. 2d 429, 443 (1987) (emphasis supplied). Thus, the state court ruled that "Stalder's testimony, *when considered with the other evidence against* (respondent), may reasonably be said to implicate (respondent). . .". *Id.* at 444.

Subsequently, this Court announced its decision in *Richardson v. Marsh*, ____ U.S. ____, 41 Cr. L. Rptr. 3039 (No. 85-1433, announced 4/21/87). *Marsh* was a case accepted by this Court to determine the correctness of "the 'evidentiary linkage' or 'contextual implication' approach to the *Bruton* questions. . .". 41 Cr. L. Rptr. at 3041. *Marsh* unequivocally rejects those approaches, and on the basis of that decision it is apparent that the decision rendered below in this case may not stand.

Here, as in *Marsh*, "the [statement] was not incriminating on its face, and became so only when linked with evidence introduced later at trial. . .". *Id.* Here, as in *Marsh*, the jury was admonished to utilize the challenged statement only against its maker, as to whom it was plainly admissible, but not as to respondent. Here, as in *Marsh*, acceptance of the Illinois court's decision would place impossible burdens on trial court judges who are faced with pre-trial severance motions based on *Bruton*; in this complex and lengthy prosecution it would have been nearly impossible to determine with accuracy before trial whether Olinger's threat to "eliminate" respondent could later be, in the context of the entire prosecution case, construed as evidence of respondent's guilt. The lower court's ruling in *Marsh*, as here, constituted an unwarranted extension of the *Bruton* doctrine and must be corrected.

Fairness dictates that petitioners concede, as they do freely, that if the Illinois Supreme Court had the benefit of this Court's decision in *Marsh* before deciding the in-

stant case, that court would have readily applied that precedent and reached an appropriate result. Unhappily, there is no extant vehicle by which petitioners can enable the Illinois Supreme Court to re-acquire jurisdiction over this case, inasmuch as the court had already denied a timely petition for rehearing three weeks before *Marsh* was announced.

In any event, it is apparent that respondent's convictions for these serious offenses have been reversed on the basis of a flawed construction of the *Bruton* case. Respondent's brief on appeal to the Illinois Supreme Court raised other allegations of error which were not addressed because of that court's decision on the *Bruton* issue. Under these circumstances, petitioners urge that this Court should summarily reverse the decision below, with an order remanding the cause for further consideration consistent with this Court's decision in *Richardson v. Marsh.* Alternatively, should this Court prefer to order same, petitioners pray that the petition for *certiorari* be granted and the cause be set for briefing and oral argument.

CONCLUSION

For all the reasons stated herein, petitioners pray that this Court summarily reverse the decision of the Illinois Supreme Court and remand this case for further proceedings consistent with *Richardson v. Marsh*. Alternatively, the petitioners pray that *certiorari* be granted and the cause set for briefing and oral argument.

Respectfully submitted,

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APPENDIX A

(No. 62199.—Reversed and remanded.)
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. WILLIAM DUNCAN, Appellant.

Opinion filed January 30, 1987.—Rehearing denied March 30, 1987.

Appeal from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Whiteside County, the Hon. Edward Keefe, Judge, presiding.

Ramsey Clark, Lawrence W. Schilling and Weldon Brewer, of New York, New York, and Louis F. Pignatelli, of Rock Falls, for appellant.

Neil F. Hartigan, Attorney General, of Springfield (Roma J. Stewart, Solicitor General, and Mark L. Rotert, Assistant Attorney General, of Chicago, of counsel), for the People.

Thomas V. Gainer, Jr., and Rimas Cernius, Assistant State's Attorneys, of Chicago, for *amicus curiae* Richard M. Daley, State's Attorney.

JUSTICE WARD delivered the opinion of the court:

The defendant, William Duncan, was indicted with Perry Olinger in the circuit court of Whiteside County for crimes of murder, armed robbery, armed violence and conspiracy (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1, 18-2, 33A-2, 8-2). A jury found the defendants guilty on all counts and, following a hearing before the court on factors in aggravation and mitigation, Duncan was sentenced to life imprisonment on the counts charging murder and 10 years' imprisonment for armed robbery. The remaining convictions

against him were vacated. The appellate court affirmed (133 Ill. App. 3d 489), and we granted his petition for leave to appeal under our Rule 315 (94 Ill. 2d R. 315).

Olinger was sentenced to death, and his convictions and sentence were affirmed on direct appeal by this court in *People v. Olinger* (1986), 112 Ill. 2d 324.

At approximately 10:15 a.m. on May 25, 1982, Tina Taber discovered the body of her boyfriend, James Adams, on the kitchen floor of his home in Rock Falls, Illinois. She testified that she found the defendant in an adjoining room sleeping on a couch. Tabor stated that the defendant did not respond when she called him, but he sat up after she "nudged" him. Taber said that he did not appear to immediately understand when she told him that she believed that Adams was hurt. She testified that he was wearing the same clothes which she had seen him wearing the previous night. Adams' dog was in the room with Duncan, she said, and the animal was acting as if he had been "drugged." She tethered the dog in the backyard, then waited in front of the house with Duncan for the police to arrive.

Later that same morning, Susan Newman discovered the body of Gordon Stevens in the house he shared with Debra Bushman in Sterling, Illinois. Newman testified that she found the front door of the house slightly ajar, though customarily it was kept locked, and she stated that when she entered the house she saw Stevens' body just inside the house lying in a pool of blood. She notified the police, and a short time later Sterling police officer Fred Moore arrived at the house.

Moore testified that he entered the house and found Stevens lying on his back on the living room floor. He discovered the body of Debra Bushman in a hallway just beyond the kitchen. She was lying on her back with her feet propped against a wall. Moore said that there were no signs of forced entry into the house.

Pathologist Larry William Blum testified that Adams died as a result of a "cutting wound" which severed his

trachea and transected his jugular vein. However, he said that the victim's vocal cords were not injured. He observed four additional wounds on the neck, though these he described as superficial. Dr. Blum testified that Adams' forehead had five distinct wounds which he said were inflicted with a blunt instrument. He was unable to determine if the wounds to the neck were administered before the trauma to the forehead. Dr. Blum also performed an autopsy on the body of Gordon Stevens; he concluded that Stevens died from a single gunshot wound to the head. He said that when discharged the weapon was held within 6 inches of Stevens' head. The doctor explained that he was unable to fix a definite time of death for either victim, but he said that the extent of rigor mortis and the chemical analyses of body fluids of the vicitms indicated that they died sometime after midnight but before 11 a.m. on May 25.

William Rouse, the pathologist who performed the autopsy on Debra Bushman, testified that she died from a gunshot wound to the head. Dr. Rouse testified that the fatal shot was fired from less then 3 feet away. He estimated her time of death as sometime after midnight but before the early afternoon hours of May 25.

There was substantial testimony regarding events of the days preceding the murders. Edward Stalder told of a burglary of the house of Dennis Burris on the night of May 22. He testified that earlier that day he was in a tavern with Olinger and Darrell Onken, and that they agreed to commit a burglary. He said that later that night he broke into the Burris house with Olinger while Onken stood watch outside, and that five handguns, including a .22-caliber magnum pistol, were taken in the burglary. The weapons were put in a burlap sack which was placed in Olinger's pickup truck. Onken substantially corroborated Stalder's testimony, although Onken said that he did not know the contents of the burlap sack. Stalder stated that Olinger kept the .22-caliber magnum and recalled that, while riding with Olinger the next day, Olinger stopped his truck and "did some target practice" from the window.

Stalder testified that, while they were en route to meet Onken the night of the burglary, Olinger proposed that Stalder join him in "taking our control of the drug traffic in the area," and that they steal drugs and money from "Jim Adams and a Bill" and "make sure there wasn't [*sic*] any witnesses left." Stalder said that Olinger repeated the proposal after they had dropped off Onken following the burglary, but in both instances he told Olinger that he was not interested. Duncan's counsel asked that the jury be instructed that any statements made by Olinger to Stalder and any testimony regarding the burglary of the house of Dennis Burris be considered only against Olinger and not be considered as evidence against Duncan. The court, having instructed the jury at the outset of Stalder's testimony that Olinger's out-of-court statements should not be considered against the defendant, declined to instruct the jury at that point.

Dennis Burris testified that a few months before the burglary of his home he had used the .22-caliber magnum pistol to shot two stray dogs on his farm. The bodies of the dogs were exhumed, and James Edward Hamby, a firearms expert of the Department of Law Enforcement, testified that the pellets recovered from the dogs and the pellets recovered from the bodies of Stevens and Bushman were fired from the same gun.

There was evidence that during the two weeks preceding the murders Adams and the defendant had made three trips to Kansas City to purchase cocaine and marijuana from Edward Kline, a drug dealer known by Duncan. On the last trip on May 22, Adams and Duncan bought five pounds of marijuana and Adams bought three and one quarter ounces of cocaine. Adams and Duncan returned to Adams' house on May 24 and "got the word out" that they had drugs for sale.

Among their customers were Merle Merkel, who testified that she bought $1,050 worth of cocaine from Adams at around 9 a.m. on May 24, and that Duncan was in the house when she made the purchase. She said Olinger ar-

rived at the house while she was there. She recalled that he did not have money to purchase cocaine and offered to exchange a .45-caliber gun for a gram of cocaine. Adams did not agree to that proposal. However, there was evidence that later that day Adams accepted a rifle from Olinger as collateral in a cocaine transaction.

Olinger's girlfriend, Rhonda Odquist, testified that she accompanied Olinger to Adams' house between 11:30 and midnight on the evening of May 24, and that she waited 10 or 15 minutes in his truck before Olinger told her to come in the house. Adams and Duncan were in the house when she entered. She stated that most of the time she was in the house she watched television in the living room while Olinger and Duncan talked in the kitchen. She and Olinger left the house around 5 or 5:15 a.m. They arrived at their house around 6:15. Olinger left 20 or 25 minutes later to go fishing, she said, and she went to sleep. The witness next saw Olinger around 9:30 that morning.

Around 9 or 9:30 p.m. on May 24 Patty Doyle injected cocaine with the defendant at Adams' residence. An hour later Duncan asked Adams for more cocaine, she said, but Adams replied that Duncan already had too much cocaine. Doyle left to go to John's Tavern, one block away, but returned sometime after 11:30 to buy a gram of cocaine. She stated that she saw Rhonda Odquist in Olinger's truck outside the house. The defendant, Adams and Olinger were in the kitchen when she purchased the cocaine, and she told the defendant that she would be back after John's Tavern closed. Olinger's truck was still in the yard when she returned after 1:30 a.m. The lights were on in the house, but no one answered when she knocked at the door.

Doyle related that on the afternoon of May 25 she was with Olinger in a tavern in Morrison. She observed that Olinger was carrying a "wad" of bills. Doyle recalled that while sitting at the bar Olinger told her that Adams had told Olinger that he had left all of his cocaine at Randy Stralow's house. Counsel for both defendants objected on hearsay grounds. The court overruled the objection but

instructed the jury that the statement should only be considered in determining the guilt or innocence of Olinger and should not be considered against Duncan.

There was testimony by an attendant at a gas station in the area that Olinger paid past bills on May 27 with a $100 bill, and there was evidence that four $100 bills were found hidden in Olinger's truck on June 3.

Randolph Stralow related that he arranged for a friend, Michael Bowers, to purchase cocaine from Adams on May 25. Adams arrived at Stralow's house around 1 a.m. and, Stralow said, Adams appeared to be upset. The witness testified that Adams received four phone calls from the defendant while he was at the house. Over defendant's objection that the testimony was hearsay, Stralow was allowed to tell the jury what Adams told him was said in the conversations. The first call came at 2 a.m., he said, and the second call came around one hour later. The witness testified that during the second conversation Duncan told Adams that his dog was loose. Stralow recalled that Adams said that he believed that the dog was intentionally released. An hour or two later Duncan called to say that the dog had returned. Finally, between 4 and 5 o'clock that morning, Adams received the fourth call from Duncan asking whether "everything was all right" and informing him that Duncan intended to go to bed. On cross-examination, Stralow said the last call may have occurred as late as 5:30 or 6:15.

Stralow stated that he observed Adams with approximately $1,800 which he repeatedly counted while at the house. As Adams was leaving, he told Stralow that he felt bad because he believed he should tape his cocaine to his chest for safekeeping before returning home. Counsel for the defendant objected to the hearsay statement, but the objection was overruled.

The defendant testified that he did not receive any money for arranging for Adams to purchase drugs from Kline in Kansas City, but he did acknowledge that Adams gave him cocaine to use. He said that Adams promised

to pay him $700 for each ounce of cocaine gotten from Kline on the last trip.

Duncan stated that Olinger arrived at Adams' house around 12:30 a.m. with Odquist. Adams left about one-half hour later. Before he left, Adams told the defendant that he should not take more cocaine because his arms were already bruised from injecting it with a syringe. Duncan said that he was concerned about Adams because they had been awake for three days and Adams had arranged to sell all the cocaine at Stralow's house. He was worried that Adams would be arrested while carrying large amounts of cocaine and money. He testified that he telephoned Stralow's house four times to speak to Adams but explained that it was his concern for Adams that led him to place the four calls.

The defendant testified that, after Adams left, Olinger paid him half of what he owed on a sale of marijuana which Olinger had received earlier, and he said that Olinger bought more marijuana. Duncan took it from a suitcase containing the marijuana purchased in Kansas City. Duncan admitted that he used cocaine with Olinger in the kitchen, but he denied that he discussed forming a partnership for the sale of cocaine with Olinger. He stated that Olinger left around 3:30 a.m. to look for Adams' dog, and he said that Olinger returned with the dog an hour later but left after a short while.

The defendant recounted that while alone in the house he tabulated the drug transactions of the day and left the paper with the figures on the dining room table. Around 5:30 he lay on the couch but was unable to sleep. He said that he took a sedative around 6 a.m., and that the next thing he remembered was Tabor waking him and telling him something was wrong with Adams.

He testified that he was disoriented when he awoke, but remembered assisting Tabor call an ambulance. He found the paper with the record of the cocaine transactions near Adams' waist, he said, and he crumpled the paper and put it in his pocket. He said that he was pre-

occupied when he pocketed the paper, and that he turned the paper over to the police the next day. The paper was admitted into evidence, and subsequent testimony established that there were traces of blood on it.

Duncan submitted to blood analyses at the request of the police. The results of the analyses revealed that Duncan had ingested Sinequan, a sedative, but they were inconclusive as to when the tablet was ingested.

Dr. Charles Petty, a forensic pathologist who examined photographs of the area where Adams' body was found, testified for the defendant. He said that blood splatters in the area were consistent with an attack on the victim from behind and that the blows to the forehead were inflicted when Adams was on his back. He stated that his opinion was that blood splatters on Adams' shirt indicated that the wounds to the neck were the first inflicted because the upper portion of the body would have had to have been upright to cause the stains on his shirt. He concluded that, because the jugular vein was severed and would cause blood to flow to his lungs, Adams would not have been able to "force air effectively past the vocal cords in order to cause them to vibrate" and enable him to cry out. On cross-examination, Dr. Petty said his conclusions did not rule out the possibility that there was more than one assailant.

The defendant argues that he was denied a fair trial by the trial court's refusal to sever his trial from Olinger's. He complains that the murder and other charges related to Adams' death were not sufficiently related to the charges arising from the deaths of Stevens and Bushman, and consequently should not have been joined in the same indictment. He contends that a severance should have been granted because, he says, the jury improperly considered hearsay statements of the codefendant against him, and he asserts that his defense was antagonistic to that of the codefendant. Additionally he argues the evidence was insufficient to support his convictions, that he was denied a fair trial by the erroneous admission and

exclusion of evidence, that he was prejudiced by prosecutorial misconduct, and that the court gave an incomplete jury instruction on circumstantial evidence. We agree that the defendant's trial should have been severed from Olinger's, and it will not be necessary to discuss other questions.

There is, of course, no question that before trial a defendant may request a severance if it appears that he will be prejudiced by a joinder of related prosecutions or defendants. (Ill. Rev. Stat. 1981, ch. 38, par. 114-8.) The pretrial motion must show the prejudice the defendant would suffer; a mere apprehension of prejudice is insufficient. (*People v. Daugherty* (1984), 102 Ill. 2d 533, 541; *People v. Lee* (1981), 87 Ill. 2d 182, 186.) The decision to grant a severance rests in the sound discretion of the trial court and will not be reversed absent an abuse of discretion. (*People v. Lee* (1981), 87 Ill. 2d 182, 186; *People v. Canaday* (1971), 49 Ill. 2d 416, 424.) Generally, defendants jointly indicted are to be tried together unless the circumstances are such that a defendant will be deprived of a fair trial if there is a joint trial. *People v. Daugherty* (1984), 102 Ill. 2d 533, 541; *People v. Lee* (1981), 87 Ill. 2d 182, 187; *People v. Clark* (1959), 17 Ill. 2d 486, 489-90.

The defendant first maintains that the counts charging him with murder, armed robbery, armed violence and conspiracy in the death of Adams were not sufficiently related to the counts charging him with the same offenses in the deaths of Stevens and Bushman to be joined in the same indictment. The legislature has provided that "[t]wo or more offenses may be charged in the same indictment * * * in a separate count for each offense if the offenses charged * * * are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." (Ill. Rev. Stat. 1981, ch. 38, par. 111-4(a).) There are no precise criteria to determine whether separate offenses are part of the "same 'comprehensive transaction' " (*People v. White* (1984), 129 Ill. App. 3d 308, 315; *People v. Sockwell* (1977), 55 Ill. App. 3d 174, 175), but the appellate court has stated that important factors to

be considered under a severance motion are the proximity in time and location of the offenses, the identity of evidence needed to demonstrate a link between the offenses, whether there was a common method in the offenses, and whether the same or similar evidence would establish the elements of the offenses. *People v. Thicle* (1983), 114 Ill. App. 3d 189, 195-96; *People v. Freeland* (1981), 103 Ill. App. 3d 94, 98; *People v. Mikel* (1979), 73 Ill. App. 3d 21, 27.

We consider that the offenses here may be said to be part of the same comprehensive transaction as contemplated by the legislature. It is true that the time of death of the victim could not be specified through expert testimony, but the pathologists were able to state that the three deaths occurred during the same 12-hour period. The defendant points out that Adams died from a "cutting wound" in the neck while Stevens and Bushman each died from a single shot in the head. The different causes of death, he says, refute any notion of common method in the offenses. Yet this is perhaps explainable, it is suggested, by the assailant's wish to extract from Adams the location of his cocaine and money before killing him. The evidence that there were superficial "torture" wounds on his neck and trauma to his head supports the theory that efforts were made to compel the information. And contrariwise, the assailant may have wanted to kill Stevens and Bushman as quickly and uneventfully as possible.

The State has identified evidence providing a link between the offenses. Duncan placed four telephone calls to Adams in the hours preceding his death in what the State said was an effort to lure him home. It was shown that Duncan was acquainted with a source of drugs in Kansas City and that Olinger was aware of Duncan's involvement with drugs. Further, we conclude that the evidence against the defendant was probative, through a theory of accountability, of the elements of murder, armed robbery and armed violence, and that it was probative of the elements of conspiracy.

The defendant's claim of serious error goes beyond the contention that the offenses were unrelated; he challenges the trial court's refusal to grant a severance on additional grounds.

This court has held that in joint trials there is a denial of the constitutional right to confrontation when a co-defendant's statement inculpating the defendant is used against him, and a denial of the right to a fair trial if there are antagonistic defenses among defendants. (See *People v. Bean* (1985), 109 Ill. 2d 80, 93; *People v. Daugherty* (1984), 102 Ill. 2d 533, 541-42.) The defendant invokes these grounds in arguing for a reversal of his conviction.

In *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, the Supreme Court held that a codefendant's out-of-court statement which inculpated the defendant was inadmissible against that defendant as a denial of his constitutional right to confrontation. Further, the court declared that the prejudice that results from the admission of the statement is not cured by instructing the jury that the statement should be disregarded in deciding the guilt or innocence of the defendant. This is because, the court said, a limiting instruction is an inadequate substitute for the right to cross-examine. (391 U.S. 123, 137, 20 L. Ed. 2d 476, 485, 88 S. Ct. 1620, 1628; see also *People v. Miller* (1968), 40 Ill. 2d 154, 158-59; *People v. Clark* (1959), 17 Ill. 2d 486, 492.) The defendant contends that Stadler's testimony concerning Olinger's statement proposing to take over the sale of illegal drugs in the area was demonstrative of Olinger's involvement in the murders, but would be improperly considered against him by the jury. He similarly argues, too, that it was prejudicial to allow Patricia Doyle to testify to Olinger's statement that Adams had left all of his cocaine at Stralow's house because it tends to show that Olinger saw the victim at the critical time after he left the house but before his murder. The defendant says that, realistically, the jury considered this testimony against him despite the court's admonition to the jury to consider the statement only against Olinger.

We must consider whether the challenged statements sufficiently implicate the defendant in the crimes to warrant examination under *Bruton*. A codefendant's confession or admission does not have to expressly state that a defendant was involved in an offense; it is enough if incriminating implications clearly point to the defendant's guilt. (*People v. Serritello* (1944), 385 Ill. 554, 558; *People v. McVay* (1981), 98 Ill. App. 3d 708, 716.) In evaluating incriminating implications, it is proper to consider the statement in light of the State's other evidence against the defendant. *People v. Ross* (1968), 41 Ill. 2d 445, 462; *People v. Clark* (1959), 17 Ill. 2d 486, 491-92.

Stalder told the jury that Olinger was eager to take over the drug trade in the area and that he was willing to rob and kill those presently involved in the trafficking of illegal drugs to accomplish his intention. The State sought to convince the jury that, after Stalder refused his offer, Olinger entered into a similar deal with Stevens. However, the State theorized that Olinger realized the benefit of conspiring with Duncan when he met the defendant at Adams' house. The State introduced evidence that Duncan was acquainted with an important source of drugs in Kansas City and could obtain substantial amounts of drugs on short notice; that he had had an argument with Adams over drugs, which Olinger witnessed, the night of the murder; that he was alone with Olinger in Adams' kitchen for hours on the night of the murders; and that he spoke to Adams four times on the telephone in what the State said was an effort to lure him home. We note that the record does not disclose direct evidence against the defendant. Stalder's testimony, when considered with the other evidence against the defendant, may reasonably be said to implicate Duncan in Olinger's plan to take over, by murder, if necessary, the drug trade in the area. Duncan should have had the opportunity to cross-examine Olinger in order to refute the inference that the defendant was offered, and accepted, a partnership in the local drug trade. The fact that Olinger did not testify deprived the defendant of his constitutional right to confrontation, and

we conclude that fundamental fairness requires that the defendant be given a new trial. See *Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620.

We do not consider Doyle's testimony to be of the incriminating type forbidden by *Bruton*. Her testimony that Olinger was told by Adams that all of the cocaine was left at Stralow's was, of course, damaging to Olinger. Yet nothing in the statement infers that Duncan was with Olinger when he had the conversation with Adams, nor does the statement, when considered with the State's other evidence, lead to the inference that Duncan was present. Therefore we discount the conclusion asserted by the defendant that Doyle's testimony improperly convinced the jury of his guilt. *People v. Hudson* (1970), 46 Ill. 2d 177, 196.

We agree with the appellate court that "the evidence supports a finding of guilt beyond a reasonable doubt." 133 Ill. App. 3d 489, 495.

Accordingly, the judgments against the defendant are reversed, and the cause is remanded to the circuit court for a new trial.

Reversed and remanded.

APPENDIX B

[Letterhead of]

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March 30, 1987

Hon. Neil F. Hartigan
Attorney General, Criminal Appeals Division
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Chicago, IL 60601

No. 62199 — People State of Illinois, appellee, v. William Duncan, appellant. Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 9, 1987.

Supreme Court, U.S.
FILED
JUL 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM DUNCAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the reversal of respondent's conviction and life sentence by the Illinois Supreme Court, expressly predicated on an Illinois severance rule that substantially predates Bruton v. United States, 391 U.S. 123 (1968), was based on adequate and independent state grounds so that this Court lacks jurisdiction to review this case?

2. Whether the decision issued below by the Illinois Supreme Court reversing repondent's conviction and remanding for a new trial is in conflict with this Court's decision in Richardson v. Marsh, 481 U.S.___, 95 L.Ed.2d 176 (1987) and, if so, whether the conflict is an adequate basis for a grant of certiorari at this time given the limited precedential importance of this case.

TABLE OF CONTENTS

		Page
Question Presented		i
Table of Authorities		iii
Opinion Below		1
Jurisdiction		2
Statement of the Case		2
Reasons for Denying Certiorari:		
Point One:	THE DECISION OF THE ILLINOIS SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND THIS COURT THEREFORE LACKS JURISDICTION	6
Point Two:	THE DECISION RENDERED BELOW BY THE ILLINOIS SUPREME COURT IS CLEARLY DISTINGUISHABLE FROM THIS COURT'S OPINION IN RICHARDSON V. MARSH AND ANY APPARENT CONFLICT IS NOT AN ADEQUATE BASIS FOR A GRANT OF CERTIORARI AT THIS TIME	13
Conclusion		20

TABLE OF AUTHORITIES

CASES	Page
Abie State Bank v. Bryan, 282 U.S. 765, 75 L.Ed.2d 690 (1931)	7
Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968)	7,9,16
California v. Carey, 471 U.S. 386, 85 L.Ed.2d 406 (1985)	11
Cruz v. New York, 481 U.S. ____, 95 L.Ed.2d 162 (1987)	12
Florida v. Rodriquez, 469 U.S. 1, 83 L.Ed.2d 165 (1984)	14
Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed.2d 158 (1935)	11
Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979)	19
Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983)	7,10,12
Poeple v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959)	8

	Page
People v. Duncan, 115 Ill.2d 429, 505 N.E.2d 307 (1987)	1,6
People v. Mcvay, 98 Ill. App.3d 708, 424 N.E.2d 922 (3d Dist. 1981)	8,9,10
People v. Olinger, 112 Ill.2d 324, 439 N.E.2d 579 (1986)	4
People v. Ross, 41 Ill.2d 445, 244 N.E.2d 608 (1968)	8
People v. Seritello, 385 Ill. 554, 53 N.E.2d 581 (1944)	8,9
People v. Sweetin, 325 Ill. 245, 156 N.E. 354 (1927)	9
Richardson v. Marsh, 481 U.S. ___, 95 L.Ed.2d 176 (1987)	7,12,13 15,17
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 53 L.Ed.2d 965 (1979)	10

OTHER AUTHORITIES — Page

Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230 (1983) — 14

Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities, 59 N.Y.U.L.Rev. 677 (1984) — 14

Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 173 (1982) — 14

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

VS.

WILLIAM DUNCAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court, reported as People v. Duncan, 115 Ill.2d 429, 505 N.E.2d 307 (1987) is attached to the petition as Appendix A, App. 1-13.

JURISDICTION

Petitioner asserts this Court has jurisdiction pursuant to 28 U.S.C. sec. 1257(3). Respondent maintains that this Court lacks jurisdiction because the decision of the Illinios Supreme Court was based on adequate and independent state grounds and is not otherwise properly reviewable by this Court.

STATEMENT OF THE CASE

The procedural history and statement of facts is set forth in the opinion of the Illinois Supreme Court below. Respondent adds the following:

The vast majority of the testimony and evidence offered by the State related only to codefendant Perry Olinger. The indictment below charged, and the State maintained, that it was Olinger who did the actual killings. With respect to the

deaths of Gordon Stevens and Debbie Bushman, there was no evidence and the State made no contention that respondent was present or in any way actually participated in those murders.

James Adams was respondent's close friend of many years. Adams' fiancee, Tina Tabor testified at trial that the two men were good friends and never had cross words. Respondent was asleep in Adams' house when Adams' body was discovered in a nearby room. Despite inferences pressed by the State from his presence nearby, respondent was not shown to have participated in this murder in any way.

Respondent testified that he had taken a strong sedative at 6:00 a.m. the morning of James Adams' murder. A voluntary blood test made the same day was consistant with this testimony. Within 30 minutes, the sedative took effect and he entered a heavily sedated sleep. He

remained asleep until some hours later when Tina Tabor awakened him. Tabor testfied that she had discovered Adams' body at 10:15 a.m., his throat slashed, skull crushed and with blood splattered around the room. She found respondent asleep in an adjacent room. With some difficulty, she was able to awaken him. He wore the same clothes he had on the night before. There was no blood on him nor in the room where he had been sleeping.(1) He had no cash or cocaine in his possession.

From the start, respondent was shocked by the death of his friend and cooperated fully with the police

---

(1) The Illinois Supreme Court, in affirming the death sentence of respondent's co-defendant Perry Olinger noted that, "the lack of blood on Duncan who was found sleeping in the same clothes he had been wearing before the murder, warrants the inference that defendant [Olinger], and not Duncan, actually committed the fatal stabbing." People v. Olinger, 112 Ill.2d 324, 439 N.E.2d 579 (1986).

investigation of the murder. When he learned of Adams' death, he immediately helped summon the police and, standing on the front porch crying, he and Tabor awaited their arrival. He cooperated with them fully, took a police polygraph and underwent hypnosis, and never in word or deed directly or indirectly evidenced knowledge of how the murder had occured. In an effort to help police find out who was involved in the murder, respondent agreed to wear a police body microphone and surreptitously record conversations with known drug dealers in the area, including codefendant Olinger. He continued his cooperation during the months before his indictment and arrest, five months after the killings took place. The police lieutenant who worked with him testified on his behalf at sentencing.

Prior to this case, respondent had no criminal record. He was honorably

discharged from the U.S. Army and character witnesses vouched for his good reputation and non-violence.

POINT ONE

THE DECISION OF THE ILLINOIS SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND THIS COURT THEREFORE LACKS JURISDICTION

The Illinois Supreme Court based its reversal of respondent's conviction upon a lack of "fundamental fairness" requiring severance and a new trial under Illinois law. People v. Duncan, App. 13. The governing principles of Illinois law requiring severance are distinct and independent, and are separate from a defendant's rights under the Confrontation Clause of the United States Constitution. As such they represent adequate and independent state grounds for the reversal, thus denying this Court

jurisdiction in this case. Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983); Abie State Bank v. Bryan, 282 U.S. 765, 773, 75 L.Ed.2d 690 (1931).

In analyzing the prejudice to respondent flowing from the statements of his codefendant Olinger, the Illinois Supreme Court assessed the statements in the context of the state's other evidence against respondent. Petitioner argues that in light of this Court's decision in Richardson v. Marsh, 481 U.S.___, 95 L.Ed.2d 176 (1987), this approach in the Illinois Supreme Court's decision amounts to "an unwarranted extension of the Bruton doctrine and must be corrected." Petition at 7.

Contrary to petitioner's assertion, in applying the linkage or contextual approach, the Illinois Supreme Court was following Illinois caselaw, far antedating the Bruton opinion, that has consistently

held that a condefendant's statement does not have to directly inculpate defendant and, "it is enough if incriminating implications clearly point to the defendant's guilt. (People v. Seritello, (1944), 385 Ill. 554, 558; People v. Mcvay (1981), 98 Ill. App.3d 708, 716)." App. 12 Citing further Illinois case precedent as authority, the Court below continued, "(i)n evaluating incriminating implications, it is proper to consider the statement in light of the State's other evidence against the defendant. People v. Ross (1963), 41 Ill.2d 445, 462; People v. Clark (1959), 17 Ill.2d 486, 491-92." Id. This line of authority rests on a defendant's right to a fair trial, not his right to confrontation, and applies equally whether the codefendant testifies or not.

In People v. Mcvay, 98 Ill. App.3d 708, 424 N.E.2d 922 (3rd Dist. 1981),

cited affirmatively by the Court below, the unique independence of the state ground for evaluating severance issues of this kind was explicitly emphasized.

> While the severance rule established and stated in Bruton v. United States (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, rested on a defendant's right to cross-examination as secured by the confrontation clause, the Illinois rule requiring severance in such situations far antedates Bruton and is premised upon fundamental principles of justice and the defendant's right to a fair trial and not merely upon a violation of the right to confront adverse witnesses. (People v. Sweetin (1927), 325 Ill. 245, 252, 156 N.E. 354; People v. Serritello (1944), 385 Ill. 554, 558, 53 N.E.2d 581.)

Id. at ____, 424 N.E.2d at 928.

The Mcvay court went out of its way to eliminate any doubt that the fair trial right requiring severance was totally independent of any violation of the right to confrontation. "Even with the ability to cross-examine, the prejudice to a

defendant from the incriminating admission by a co-defendant remains, and a severance should be granted." Id. Thus the independence of the state grounds is readily "apparent from the four corners of the opinion." Michigan v. Long, 463 U.S. at 1040, 77 L.Ed.2d at 1204.

This is not a situation where the Illinois Supreme Court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568, 53 L.Ed.2d 965 (1979). Illinois has historically taken an independent, state based approach to the analysis of severance issues in general, and the adoption of the contextual method for review of the prejudice in codefendant statements is but one example of this independence.

This Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210, 80 L.Ed. 158 (1935). The decision below, grounded in both federal constitutional guarentees and independent Illinois state law guarantees, should not now be affected by an apparent adjustment to the federal precedent cited by the state court. "This is not a case in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute, . . . a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law." California v. Carey, 471 U.S.

386, 85 L.Ed.2d 406 (1985) (Stevens, J. dissenting), quoting Michigan v. Long, 463 U.S. at 1067-1068, 77 L.Ed.2d at 1232 (Stevens, J. dissenting).(2)

Because the decision below rests on both federal law, and adequate and independent Illinois law, this Court lacks jurisdiction to review the action of the Illinois Supreme Court in this case.

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(2) Respondent is aware that this Court recently granted certiorari and remanded three cases for reconsideration in light of Cruz v. New York, 481 U.S. ___, 95 L.Ed.2d 162 (1987). See, 55 U.S.L.W. 3729-30. The contrasts between Cruz and Marsh highlight Justice Stevens comments. In Cruz, the companion case to Marsh, this Court reversed a defendant's conviction holding that the admission of a codefendant's confession violated the Confrontation Clause even though it was corroborated by defendant's own "interlocking" confession. Thus in Cruz, unlike in Marsh, this Court redressed a State's violation of an individual's constitutional rights. In contrast, Marsh is an expression that a constitutional right has been improperly extended and clarifies an interpretive conflict in the federal courts. Once clarification has been made, the need for review in similar cases has been eliminated.

POINT TWO

THE DECISION RENDERED BELOW BY THE ILLINOIS SUPREME COURT IS CLEARLY DISTINGUISHABLE FROM THIS COURT'S OPINION IN RICHARDSON V. MARSH AND ANY APPARENT CONFLICT IS NOT AN ADEQUATE BASIS FOR A GRANT OF CERTIORARI AT THIS TIME

Richardson v. Marsh is distinguishable from the case at bar. Procedurally, the two cases are significantly different. Marsh came to this Court upon the reversal by the United States Court of Appeals for the Sixth Circuit of a Michigan State Court conviction. Thus, by its decision in Marsh, this Court reinstated a state trial court judgment, affirmed by the Michigan Court of Appeals with leave to appeal denied by the Michigan Supreme Court. In reversing the Sixth Circuit, this Court was exercising its supervisory function over the federal judiciary.

"As the Court of last resort in the

federal system [this court] . . . must occasionally perform a pure error correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land." Florida v. Rodriquez, 469 U.S. 1,7, 83 L.Ed.2d 165 (1984) (Marshall, J. dissenting). As has been reiterated by both members of this Court and other commentators, the general function of the Supreme Court is not the correction of perceived errors in lower court decisions. See e.g., Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities, 59 N.Y.U.L.Rev. 677, 761 (1984); See also, Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 231 (1983); Stevens, Some Thoughts on Judicial Restraint, 66

Judicature 173, 181 (1982). As this Court's own rules point out, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Sup.Ct.R. 17 (emphasis added). Reasons of this type are nowhere present in this case.

Even if one assumes arguendo that the Illinois Supreme Court incorrectly construed Bruton in this case, which respondent denies, no significant detriment would flow from this error sufficient to merit the exercise of this Court's certiorari jurisdiction. If the decision of the Illinois Supreme Court stands, William Duncan will have a new trial and either his guilt will be established beyond a reasonable doubt or he will be acquitted. The future application of Richardson v. Marsh in

confrontation rights cases will in no way be impeded or compromised. Thus this case stands alone, presenting an isolated and unique situation which will not repeat and which therefore does not merit review by this Court.

Petitioner asserts that "acceptance of the Illinois Court's decision would place impossible burdens on trial court judges who are faced with pre-trial severance motions based on Bruton." Petition at 7. This statement ignores the fact, as noted in Point One, supra, that Illinois' "contextual linkage" approach in weighing whether prejudice warrants severance considerably antedates Bruton and has been successfully applied in Illinois without any such burdens arising. Furthermore, presented merely as a question of judicial administration, the burden such a rule may place on the trial courts of Illinois is an issue for the

Illinois Supreme Court to examine, and not within the supervisory jurisdiction of this Court.

Factually, the Marsh case is also distinguishable from the case at bar. The holding in Marsh was precisely stated: "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existance." Id. 481 U.S. at ___, 95 L.Ed.2d at 188. In Marsh it was only through the defendant's own testimony that a linkage to the objectionable statements was established. 481 U.S. at ___, 95 L.Ed.2d at 184. Significantly, in a footnote, limitations of the Marsh holding were further emphasized by the clarification that no opinion was expressed as to the admissibility of a confession when the

defendant's name had been replaced by a symbol or pronoun. Id., f.n. 5.

In contrast, in the present case, one of the objectionable statements clearly identifies respondent by his first name. App. at 4. Further in contrast to Marsh, respondent Duncan, testifying on his own behalf, was forced to emphatically deny the evidentiary implications of those statements, a burden he would not have faced except for their prejudicial admission. App. 7-8. The prosecution's argument for defendant's involvement in the murders rested primarily on the nontestifying condefendant's out of court statements. App. 11-12.

In addition to differences between this case and Marsh, there are other reasons why Marsh should not be applied. This Court has recognized that in criminal litigation concerning constitutional claims "the interests of justice" and "the

exigencies of the situation" my argue in favor of limiting a new rule's retroactive effect. Applying these principles to the case at bar, it is clear that in the interests of justice the Marsh rule should not be applied to this case. This is particularly true in light of the paucity of evidence linking respondent to the crimes charged. Respondent contested the constitutionality of his conviction in that his guilt was not proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). The Illinois Supreme Court, while recognizing that there was absolutely no direct evidence linking William Duncan to the crimes charged, rejected this argument without elaboration. App. 12, 13. By allowing the decision below to stand, William Duncan will not be freed, but will be forced to stand trial again, this time on his own. The State of Illinois will be

required to prove his guilt beyond a reasonable doubt, a task they have thus far failed to accomplish.

Petitioner asks this Court to reinstate William Duncan's conviction and deny him the new trial ordered by the Illinois Supreme Court. This action is not in the interests of justice and should not be ordered.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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